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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON**

**R. ALEXANDER ACOSTA**, Secretary of  
Labor, United States Department of Labor,

Plaintiff,

v.

**HOA SALON ROOSEVELT, INC.**, a  
Washington corporation, **HOA SALON  
BALLARD, INC.**, a Washington corporation,  
**THUY MICHELLE NGUYEN PRAVITZ**, an  
individual and managing agent of the  
Corporate Defendants, **ERIC PRAVITZ**, an  
individual and managing agent of the  
Corporate Defendants,

Defendants.

Case No.: 2:17-CV-00961-JLR

**PLAINTIFF'S MOTIONS *IN LIMINE***

**ORAL ARGUMENT REQUESTED**

1 This case is about Defendants' violations of the Fair Labor Standards Act  
2 ("FLSA"), which include failing to pay their workers for all hours worked and  
3 failing to keep and maintain accurate records. To promote efficiency in the  
4 presentation of evidence to the jury, Plaintiff Secretary of Labor submits the  
5 following motions *in limine* for the Court's consideration. Pursuant to Local Rule  
6 7(d)(4), the undersigned counsel certifies that she has conferred with  
7 Defendants through their attorneys and the parties held a telephonic conference  
8 on Friday, Dec. 21, 2018 to attempt to resolve evidentiary issues and discuss the  
9 motions anticipated by the Secretary. The parties were able to come to  
10 agreement on the issue of immigration status and the Defendants' represented  
11 that they would not elicit testimony or offer evidence about the immigration status  
12 of any of the witnesses.<sup>1</sup>

13 "Motions *in limine* are designed to avoid the delay . . . caused by  
14 objections and offers of proof at trial." Wilson v. Williams, 182 F.3d 562, 566 (7th  
15 Cir. 1999). Such motions are "useful tools to resolve issues which would  
16 otherwise 'clutter up' the trial." Palmerin v. City of Riverside, 794 F.2d 1409, 1413  
17 (9th Cir. 1986). Motions in limine are appropriate to exclude inadmissible or  
18 prejudicial evidence. Oyarzo v. Tuolumne Fire Dist., 2013 WL 5718882 (E.D.  
19 Cal., 2013). Whether to grant a motion *in limine* is left to the sound discretion of  
20 the district court. United States v. Ravel, 930 F.2d 721, 726 (9th Cir.1991).

21 The Secretary of Labor respectfully requests that the Court grant the  
22 following motions:

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25 <sup>1</sup> The immigration status of the non-party employees for whom the Secretary seeks back  
26 wages is irrelevant to any defense to allegations that the Defendants violated the overtime pay,  
27 minimum wage, or record keeping requirements of the FLSA. In re Reyes, 814 F.2d 168, 170 (5th  
Cir. 1987); Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 748-49 (D. Md.  
2008); Zeng Liu v. Donna Karan Intern., Inc., 207 F.Supp.2d 191, 192 (S.D.N.Y., 2002).

1       **1. The Court should prohibit Defendants from presenting evidence or**  
2       **argument concerning the Secretary’s underlying investigation,**  
3       **including investigative process and methods, internal deliberations,**  
4       **or decision to investigate Defendants.**

5       The Court should exclude any evidence or argument concerning the  
6       Secretary’s investigative process and methods, internal deliberations, or decision  
7       to investigate Defendants.<sup>2</sup> Fed. R. Evid. 401 and 402. Such topics are irrelevant  
8       to whether Defendants violated the FLSA.<sup>3</sup>

9       <sup>2</sup> Because the Secretary intends to rely upon them at trial, the identities of and information  
10      provided by the Secretary’s informer witnesses are relevant and thus have been disclosed. See  
11      Fed. R. Civ. P. 26(a)(3)(A)(i), (iii).

12      <sup>3</sup> Even if the investigation were relevant, various privileges shield the Secretary’s  
13      investigation from inquiry—protecting the identity of complainants as government informants,  
14      protecting communications between the agency and its informants, and protecting internal  
15      deliberations. First, the Ninth Circuit in In re Perez held that disclosing the identities of all non-  
16      testifying Department informers was unnecessary where the Department had already disclosed  
17      the identities and statements of each testifying employee and where the Defendant company  
18      had access to the remaining affected employees’ records. In re Perez, 749 F.3d 849, 856-59  
19      (9th Cir. 2014)).

20      Second, communications between representatives of the Secretary and workers who  
21      have a common legal interest are protected by the common interest privilege, an extension of  
22      the attorney client privilege. Sec’y of Labor v. Kazu Construction, LLC, 2017 WL 628455, \*8  
23      (U.S.D.C. Hawaii, March 28, 2018). The attorney-client privilege protects communications made  
24      by a client in confidence to his attorney and serves to promote full and frank communication  
25      between attorneys and their clients. Upjohn Co. v. United States, 449 U.S. 383, 388 (1981). The  
26      Ninth Circuit has explicitly recognized that communications between parties with a common  
27      legal interest for the purpose of furthering that interest may be subject to the attorney-client  
28      privilege. United States v. Gonzalez, 669 F.3d 974, 978 (9th Cir. 2012).

29      Finally, the deliberative process privilege protects “advisory opinions, recommendations  
30      and deliberations comprising part of a process by which governmental decisions . . . are  
31      formulated.” FTC v. Warner Commc’ns, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). The purpose  
32      of the privilege is to shield intra-agency communications from disclosure “to allow agencies  
33      freely to explore possibilities, engage in internal debates, or play devil’s advocate without fear of  
34      public scrutiny.” Assem. of State of Cal. v. U.S. Dep’t of Commerce, 968 F.2d 916, 920 (9th Cir.  
35      1992).

36      In the course of discovery Defendants have not attempted to override these privileges  
37      and there may not be any controversy over the protections discussed above. They are included  
38      here to preserve the objection in the event that Defendants intend to elicit testimony protected  
39      by these privileges. Defendants’ witness and exhibit lists are due to be shared with the  
40      Secretary on Jan. 2, 2019 pursuant to Local Rule 16.

1 Defendants' effort to divert attention from their own conduct to the  
2 Secretary's investigation is a common defense tactic. However, how the  
3 Secretary conducted his investigation and any decision related to that  
4 investigation is wholly irrelevant to whether Defendants violated the FLSA.  
5 Defendants' failure to pay their workers in compliance with the FLSA and their  
6 subsequent retaliation—not the Secretary's investigation—is what is on trial.

7 Numerous courts have considered and rejected defendants' attempts to  
8 deflect attention and waste time litigating over the sufficiency and quality of a  
9 government agencies' civil investigative process. In Red Ball Interior, the  
10 employer defending against FLSA violations sought discovery to attack "the  
11 quality of the [Secretary's] investigation." Donovan v. Red Ball Interior Demolition  
12 Corp., 1982 WL 2052, at \*1 (S.D.N.Y. Sept. 21, 1982). The district court rejected  
13 the employer's effort to explore the details and merits of the Secretary's  
14 investigation, explaining

15 [T]he thoroughness and quality of the plaintiff's investigation will not  
16 be an issue at trial. The issues at trial with respect to whether  
17 violations of the Fair Labor Standards Act occurred will depend on  
the evidence adduced at trial, not on the evidence uncovered or not  
uncovered during the course of the investigation.

18 Id. As a circuit court reasoned, permitting a defendant to challenge an agency's  
19 civil investigation "would deflect the efforts of both the court and the parties from  
20 the main purpose of th[e] litigation: to determine whether [the defendant] has  
21 actually violated' the law." Keco Indus., 748 F.2d at 1100 (quoting EEOC v. Chi.  
22 Miniature Lamp Works, 526 F. Supp. 974, 975 (N.D. Ill. 1981)). As a result,  
23 inquiry into the government's civil investigation leading up to the government's  
24 lawsuit "is inappropriate satellite litigation." United States v. Lake Cnty. Bd. of  
25 Com'rs, 2006 WL 1660598, at \*2 (N.D. Ind. June 7, 2006); see also Madden v.  
26 Int'l Hod Carriers', Bldg. & Common Laborers' Union of Am., 277 F.2d 688, 693  
27 (7th Cir. 1960) ("[T]he scope, conduct or extent of the preliminary investigation

1 are not matters relevant to or material for consideration on the issue to be  
2 adjudicated on hearing of . . . whether reasonable cause exists to believe a  
3 violation has occurred.”);<sup>4</sup> EEOC v. Gold River Operating Corp., 2007 WL  
4 983853, at \*3 (D. Nev. March 30, 2007) (courts “are in agreement that an  
5 employer may not litigate the adequacy of the EEOC’s investigation or  
6 determination”) (citing cases).

7 Thus—for *decades*—courts in a variety of contexts have trained their focus  
8 on defendants’ conduct, resisting defendants’ efforts to put the underlying civil  
9 government investigative process on trial. This is because, as those courts have  
10 explained, the proper protection of defendants’ rights is holding the government  
11 to its burden to prove its claims at trial, which will be the case here.<sup>5</sup> Most  
12 recently, this issue was addressed when a court struck a defendant’s affirmative  
13 defense that the underlying investigation by the Department of Housing and  
14 Urban Development (“HUD”) violated its due process rights. United States v.  
15 East River Housing Corp., 90 F. Supp. 3d 118, 133-37 (S.D.N.Y. 2015); see also  
16 Hibbing, 266 F.R.D. at 273 (rejecting “affirmative defense of a tainted  
17 investigation and reasonable cause finding”). There, a defendant asserted a  
18 complete bar to the case, alleging deficiencies related to HUD’s investigation. E.  
19 River, 90 F. Supp. 3d at 133. In rejecting that affirmative defense, the court  
20 explained that the “the alleged deficiencies in HUD’s investigative process have  
21 no bearing on the legitimacy of this civil action commenced by the Department of

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22 <sup>4</sup> See also D’Amico v. Cox Creek Refining Co., 126 F.R.D. 501, 505-06 (D. Md. 1989)  
23 (same); United States v. Electro-Voice, Inc., 879 F. Supp. 919, 923-24 (N.D. Ind. 1995)  
24 (“[I]nformation about the adequacy of the Regional Office’s investigation of the case or the  
Agency’s review of the evidence . . . is not relevant.”).

25 <sup>5</sup> See, e.g., Keco, 748 F.2d at 1100 (“If the charge is not meritorious, procedures are  
26 available to secure relief, i.e. a de novo trial in the district court.”); Madden, 277 F.2d at 693 (“[T]he  
27 adequacy of the investigation is judicially tested only by the Board’s subsequent ability to sustain  
its initial determination that the investigation disclosed reasonable cause to believe that a violation  
occurred”); EEOC v. Hibbing Taconite Co., 266 F.R.D. 260, 273 (D. Minn. 2009) (whether EEOC  
brought claim properly “is an issue for the Trial, when the EEOC must prove to a fact-finder that  
the discrimination alleged in fact occurred”).

Justice.” *Id.* at 134 (citing *Lake Cnty.*, 2006 WL 1660598, at \*2). Rather, the court explained, “[i]t would be irrational to treat [those deficiencies] as complete defenses to a civil action in which a factfinder will duly consider the merits of the Government’s claims.” *Id.* at 134.

From a practical perspective, these principles all make sense—particularly in the context of employment litigation—as workers who boldly come forward to complain to the Secretary about their employers should not have to worry about the conduct of an investigation they had no control over. *See E. River*, 90 F. Supp. 3d at 135); *see also EEOC v. Recruit USA, Inc.*, 939 F.2d 746, 753 (9th Cir.1991). Once litigation has been initiated, whether workers’ complaints have merit will rise or fall on the evidence the Secretary presents at trial. Why the Secretary chose to investigate Defendants and how well the Secretary conducted his investigation does not bear—one way or the other—on whether Defendants violated the FLSA or whether Defendants have a defense to any such violations. Put simply, even if Defendants had cause to argue that the Secretary conducted a flawed investigation, that argument provides no excuse for Defendants violating the FLSA by failing to pay their employees the wages they are due.

**2. The Court should prohibit Defendant from referring to the Secretary’s on-site visits to Defendants’ establishments as “raids.”**

In the course of discovery, Defendants referred to the Department of Labor’s on-site visits to the Defendants’ establishments as “raids.” The Defendants should be prohibited from referring to these on-site visits as “raids” because the investigation is irrelevant, the use of such terminology is prejudicial and misleading, and would be a waste of time. Fed. R. Evid. 401, 402, 403, and 611.

As argued above, it is the Defendants’ failures to act in accordance with the FLSA, and not the Department’s investigation that is at issue. Evidence must

1 be relevant to a claim or defense in this case—evidence is relevant only if it has  
2 a “tendency to make the existence of any fact that is of consequence to the  
3 determination of the action more probable or less probable than it would be  
4 without the evidence.” Fed. R. Evid. 401. Evidence that is not relevant to a fact  
5 that is of consequence to the trial is inadmissible. Fed. R. Evid. 402; see also  
6 Estate of Gonzales v. Hickman, et al., 2007 WL 3237635, at \*8-9 (C.D. Cal. June  
7 28, 2007) (finding proposed testimony irrelevant to party’s claim and accordingly  
8 inadmissible as irrelevant under Rule 401 and 402). As discussed above, the  
9 Department’s investigation is not relevant.

10       Next, calling these on-site visits “raids” only serves to prejudice the jury  
11 against the Secretary. Even if minimally relevant, testimony may be excluded if  
12 its probative value is substantially outweighed by the risk of unfair prejudice,  
13 confusion of the issues, or misleading the jury. Fed. R. Evid. 403. The  
14 Department of Labor’s investigation included visits to Defendants’ business  
15 located in the Roosevelt neighborhood, and the site of Hoa Salon Ballard in the  
16 Ballard neighborhood. These visits included requesting a meeting with the  
17 managers and owners, asking for opportunities to meet with employees, and  
18 surveying the worksite. The Department’s investigators are not armed and they  
19 regularly meet with employers and employees at their place of work during  
20 unannounced visits. Defendants’ use of the term “raid” implies force and surprise,  
21 evoking scenes of police “raids” during criminal investigations as depicted in  
22 television shows and movies—and is not descriptive of what occurred during the  
23 investigation of the Defendants’ businesses.

24       Finally, the Court “should exercise reasonable control over the mode and  
25 order of examining witnesses and presenting evidence so as to . . . avoid wasting  
26 time.” Fed. R. Evid. 611(a)(2). Testimony about the Department’s “raids” would  
27 only tend to waste the court’s and the jury’s time. If Defendants characterize the

1 Department's routine investigation and site visits as "raids" it would necessitate  
2 the Secretary calling or recalling witnesses to correctly describe the course of  
3 events during the investigation, including how the department conducted those  
4 on-site visits. Defendants' use of the term "raid" when referring to routine  
5 investigations to determine compliance with the Fair Labor Standards Act is  
6 prejudicial and would waste the court and the jury's time. Therefore, the Court  
7 should prohibit Defendants from referring to these visits as "raids" in their  
8 questioning and when individual Defendants are testifying.

9  
10 **3. The Court should prohibit Defendants from presenting evidence not  
11 produced in the course of discovery.**

12 Federal Rule of Civil Procedure 37 provides, in relevant part, that "[i]f a  
13 party fails to provide information or identify a witness as required by Rule 26(a) or  
14 (e), the party is not allowed to use that information or witness to supply evidence  
15 on a motion, at a hearing, or at a trial, unless the failure was substantially justified  
16 or is harmless." A party's "failure to provide such information during discovery  
17 renders any such effort to do so at trial subject to the exclusionary sanctions of  
18 Rule 37." Markos v. Sears, Roebuck and Co., No. CV 05-3051 CBM (JWJx),  
19 2007 WL 5162457, at \*3 (C.D. Cal. Mar. 19, 2007) citing Yeti by Molly, Ltd. v.  
20 Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001) (holding that  
21 "exclusion is an appropriate remedy for failing to fulfill the required disclosure  
22 requirements of Rule 26(a)" even absent a showing of bad faith or willfulness on  
23 part of sanctioned litigant)); see also Hoffman v. Constr. Protective Services, Inc.,  
24 541 F.3d 1175, 1180 (9th Cir. 2008) ("Rule 37(c)(1) gives teeth to these  
25 requirements by forbidding the use at trial of any information required to be  
26 disclosed by Rule 26(a) that is not properly disclosed." (quoting Yeti, 259 F.3d at  
27 1106)).

"The Rule 37 sanction of exclusion for failure to comply with Rule 26 is

1 mandatory, 'unless such failure is harmless.'" Markos, 2007 WL 5162457, at \*3  
2 (quoting Fed. R. Civ. P. 37(c)(1)). "It is the duty of the party seeking admission of  
3 the evidence to establish the harmlessness of the failure to produce." Id.; see  
4 also Von Brimer v. Whirlpool Corp., 536 F.2d 838, 843 (9th Cir. 1976) (holding,  
5 *inter alia*, that district court properly excluded certain documents which plaintiffs  
6 had not produced until the eve of trial); Zhang v. Am. Gem Seafoods, Inc., 339  
7 F.3d 1020, 1028 (9th Cir. 2003) (holding, *inter alia*, that district court did not  
8 abuse its discretion in excluding document from trial that was not produced in  
9 discovery).

10 As discussed below, Defendants failed to timely produce some payroll  
11 records for Hoa Salon Ballard; and point of sale records for Hoa Salon Ballard  
12 and Hoa Salon Roosevelt during discovery and now intend to use them at trial.

13 ***a. Defendants' purported time records showing hours worked by***  
14 ***employees of Hoa Salon Ballard for 2015, produced on***  
15 ***December 6, 2018, should be excluded.***

16 On April 30, 2018, Defendants responded to discovery requests directed to  
17 Hoa Salon Ballard requesting all time records showing hours worked from June  
18 22, 2014 to the present (RFP No. 1) and all documents related to Defendants  
19 recording and compensating employees for hours worked (RFP No. 5).

20 Declaration of Abigail Daquiz ("Daquiz Decl."), Ex. 1 (Hoa Salon Ballard narrative  
21 responses to Request for Production). Defendants produced a handful of  
22 worksheets showing a monthly summary of hours reported per day for one month  
23 in 2015 and 4 months in 2016. Daquiz Decl., ¶ 3. Defendants stated that  
24 "responsive documents in Defendant's possession have been produced."  
25 Elsewhere in their responses Defendants stated that that after the Ballard  
26 establishment's assets were sold in June 2016, "many business records were not  
27 kept." Daquiz Decl., Ex. 1, Response to RFP No. 4, at p. 7. Defendants gave no

1 indication that a further production would be coming. Then, on Dec. 6, 2018,  
2 months after the Defendant owners and managers were deposed and after the  
3 close of discovery, Defendants produced supplemental responses containing 12  
4 months of data from 2015 for the Hoa Salon Ballard location. Daquiz Decl., Ex. 2  
5 (Hoa Salon Ballard Supplemental Responses to Request for Production); and  
6 ¶ 5. These documents from 2015 were squarely within scope of the Secretary's  
7 first set of discovery directed to Hoa Salon Ballard, Inc. and should have been  
8 timely produced. Defendants provide no explanation why documents that were  
9 purportedly created in 2015 as part of their business of making and keeping  
10 records of hours was not produced during the course of discovery. They should  
11 be excluded as a sanction under Rule 37.

12  
13 ***b. Defendants' Point of Sale Records are irrelevant and, even if***  
14 ***they were relevant, Defendants failed to produce them during***  
15 ***discovery and they should be excluded.***

16 In the course of discovery, the Secretary asked the Defendants Hoa Salon  
17 Ballard and Hoa Salon Roosevelt for the following:

- 18 - All documents related to Defendants' recording and compensating  
19 employees for hours worked, including overtime hours (RFP No. 5);  
20 - All documents relating to Defendants' income and expenses (RFP No.  
21 11); and  
22 - All documents that Defendants may use to support their claims and/or  
23 defenses (RFP No. 14).

24 Daquiz Decl., Ex. 1 and Ex. 3 (Hoa Salon Roosevelt discovery responses). In  
25 responses to the Secretary's request for documents, the Defendants responded  
26 to each of these requests on April 30, 2018, after seeking extensions on the  
27 original deadline. Id. Each Defendant answered that responsive documents have

1 been produced. Id. Defendants Michelle Pravitz and Eric Pravitz were deposed  
2 on August 22, 2018 and August 23, 2018, respectively. Daquiz Decl., ¶ 5.  
3 Discovery closed on Oct. 15, 2018. Dkt. 17. On December 14, 2018, Defendants  
4 supplemented their production with selected hourly point of sale summaries.  
5 Daquiz Decl., ¶ 7. On December 21, 2018, counsel for Defendants further  
6 supplemented its production by producing 20 MBs of data and roughly 1,400  
7 pages that purport to be information about sales recorded at the nail salons. Id.,  
8 Ex. 5 (sample of pages from production with point-of-sale records).

9       Here, Defendants intend to use point of sale data to show that there were  
10 times of the day during the workday where there were very few or no sales  
11 processed, arguing that there *could have been* time for employees to take  
12 breaks. First, this data is irrelevant in that it does not tend to make a claim or  
13 defense more or less likely and should be excluded. Fed. R. Evid. 401, 402. The  
14 data is backward looking and shows at what time a sale was recorded by their  
15 cashier in their sales software. It does not show a record of when workers were  
16 working preparing for clients, nor does it show when clients arrived or how long a  
17 particular service or set of services took for any individual client. Whether or not  
18 workers were provided an uninterrupted meal break such that they would not be  
19 compensated for that break is not made more or less likely by looking at data of  
20 when sales were recorded. Workers were required to report to the salon at 9:30  
21 AM prior to the salon opening at 10 AM, whether or not there were appointments  
22 scheduled to begin at 10 AM or not. Daquiz Decl., Ex. 4 (M. Pravitz Deposition).  
23 Further, the point of sale data would only tend to confuse the issue, mislead the  
24 jury, and waste the judge and jury's time and should be excluded. Fed. R. Evid.  
25 403. Additionally, prolonged testimony and a presentation of point of sale data for  
26 a period of three years for two nail salons would be a waste of the court's and the  
27 jury's time. Fed. R. Evid. 403 and 611(a)(2).

1 Finally, Defendants only produced this data on December 14, 2018 and  
2 December 21, 2018—months after the Secretary had deposed the Defendants  
3 and two months after the close of discovery. This last-minute production is  
4 extraordinarily prejudicial to the Secretary, as the Secretary has already deposed  
5 Defendants' managers and was not able to question them about these  
6 documents at their duly noted depositions. As a result, Defendants should not be  
7 allowed to proffer data and information on the point of sale data during the trial.

8  
9 **4. The Court should prohibit Defendants from presenting alternative**  
10 **calculations of its back wage liability.**

11 On Dec. 19, 2018, Defendants for the first time produced an analysis of  
12 their payroll records showing instances of where they admit their own records  
13 show that they did not calculate overtime pay correctly. Defendants calculated  
14 that they owe employees a figure that is far below what the Secretary has  
15 calculated. This Court should exclude this calculation because it is not relevant, it  
16 would create confusion, and would be a waste of time. Fed. R. Evid. 401, 402,  
17 and 403. Further, Defendants did not produce these calculations during  
18 discovery and the calculations rely upon the late produced records from Hoa  
19 Salon Ballard that referred to work performed by employees in 2015 (referred to  
20 above) and should be excluded from evidence.

21 First, in cases where an employer did not keep accurate records of  
22 employees' time, the Court applies the burden-shifting analysis of Anderson v.  
23 Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). Under Mt. Clemens, the  
24 Secretary can "prove an FLSA violation by showing that employees performed  
25 work for which they were improperly compensated and producing some evidence  
26 to show the amount and extent of that work 'as a matter of just and reasonable  
27 inference.'" In re Perez, 749 F.3d 849, 853 (9th Cir. 2014) (quoting Mt. Clemens,  
328 U.S at 687); see also McLaughlin v. Ho Fat Seto, 850 F.2d 586, 589 (9th Cir.

1 1988) (same). “The burden then shifts to the employer to come forward with  
2 evidence of the precise amount of work performed or with evidence to negative  
3 the reasonableness of the inference to be drawn from the [Secretary’s]  
4 evidence.” In re Perez, 749 F.3d at 853 (quoting Mt. Clemens, 328 U.S. at 687–  
5 88). Defendants did not keep a record of their employees’ breaks and their own  
6 records and admission will show that they failed to record all hours worked.  
7 Defendants’ recalculations are not evidence of the precise amount of work  
8 performed nor do they “negative the reasonableness” of the Secretary’s  
9 evidence. Therefore, they should be excluded as not relevant to the claims or  
10 defenses. Fed. R. Evid. 401, 402.

11 Further, any probative value of the Defendants’ analysis of its payroll data  
12 is substantially outweighed by the possibility of confusing the issues, misleading  
13 the jury and wasting time. Fed. R. Evid. 403. The Secretary’s case is broader  
14 than the calculation error that resulted in unpaid wages revealed by Defendants’  
15 analysis. Defendants did not maintain records of all of the hours worked and  
16 workers will testify that they regularly worked 9.5 or up to 10 hours per day, and  
17 were regularly only paid for 9 hours—and at issue is the unrecorded (and unpaid)  
18 time. Testimony about the wages the Defendants’ admit they did not pay for the  
19 hours that they did record confuses the issue and could mislead the jury and  
20 should be excluded.

21 Finally, Defendants’ analysis of the overtime it admits to owing its workers  
22 who worked at Hoa Salon Ballard in 2015 is built largely from these late-  
23 disclosed payroll records. See, supra, pp. 8-9. The calculations and some of the  
24 underlying data used to arrive at the calculations were not disclosed during  
25 discovery and should be excluded as a sanction for the untimely disclosure. Fed.  
26 R. Civ. P. 37.  
27

1       **5. The Court should prohibit Defendants from inquiring about any**  
2       **awards of back pay that worker witnesses may have received as a**  
3       **result of government investigations of previous employers.**

4       During the depositions of worker witnesses, Defendants inquired into the  
5       witnesses' prior employment history and whether they received back pay awards  
6       stemming from a government investigation of their prior employers (another nail  
7       salon that is not a Defendant here). Inquiring into these prior investigations and  
8       any resulting award of back wages to these employees should be excluded  
9       because such evidence is irrelevant, it would be a waste of time and could be  
10      misleading or confusing, and it is improper character evidence.

11      First, Defendants cannot argue that prior investigations and awards of  
12      back pay are relevant to a claim or defense. Fed. R. Evid. 401 and 402. The  
13      employers will likely defend to say that they did in fact pay for all of the hours  
14      their employees worked; or that the employees are lying when they testify that  
15      they did not take uninterrupted breaks. Evidence of prior back wage payments  
16      does not make it more or less likely that Defendants paid for all of the hours that  
17      particular employee worked or that workers are lying about whether or not they  
18      were afforded uninterrupted breaks that was not compensable work time. To the  
19      extent that Defendants want to argue that the possibility of recovering back  
20      wages gives a witness an incentive to lie, they can do that by establishing that  
21      the employee knows that the case at bar might result in a back wage award.  
22      Whether the employees were previously deprived of wages by a different  
23      employer in an unrelated case and later recovered back wages because of a  
24      government investigation does not make any of Defendants' defenses more or  
25      less likely.

26      Second, even if it were marginally relevant, the Court should exclude  
27      evidence of prior back wage payments because its probative value is  
substantially outweighed by the danger that it will be confusing and misleading to

1 the jury and would be a waste of the Court's and the jury's time. Fed. R. Evid.  
2 403. Evidence of these prior back wage payments has the potential to confuse  
3 the issues and mislead the jury because inherent in the employer's argument that  
4 the evidence is admissible is an argument that the employee is someone who  
5 plays the system and unfairly received those back wages.

6 Further, admitting evidence of the employees receiving back wages in an  
7 unrelated case would necessitate a mini-trial on the prior case and would be a  
8 waste of time. Fed. R. Evid. 403, 611(a)(2). It would open up an exploration of  
9 the allegations against that other establishment that resulted in that back wage  
10 award, whether the employer admitted to the violations or contested them,  
11 whether the employee was an active participant or simply a member of the class  
12 of workers affected and who was awarded back pay. All of this would be a waste  
13 of time.

14 Finally, extrinsic evidence of a witnesses' conduct is only admissible to  
15 attack the witnesses' character if it is "probative of the character for truthfulness  
16 or untruthfulness." Fed. R. Evid. 608(b). The fact that an employee received back  
17 wages as a result of a prior government investigation is only evidence of this type  
18 if the employer has evidence that that the employee lied during that prior  
19 investigation.

20 **6. The Court should prohibit Defendants from inquiring about other**  
21 **complaints employees' have made about their employment.**

22 Former employee, Chau Ong, made a complaint to the Washington State  
23 Labor and Industries that she was not paid for overtime. That complaint resulted  
24 in a finding that Hoa Salon Ballard, Inc. did not violate the Washington State  
25 wage payment law concerning Ms. Ong. Daquiz Decl., Ex. 6 (Letter from LNI).  
26 Evidence about that prior complaint should be excluded as irrelevant, a waste of  
27

1 time, misleading or confusing, and it is improper character evidence. Fed. R.  
2 Evid. 401, 402, 403, and 608.

3 As argued above, testimony and evidence about employees' other  
4 complaints, other than whether they were compensated in accordance with the  
5 Fair Labor Standards Act, is irrelevant to whether or Defendants violated the Act.  
6 The only way that this prior complaint would have been relevant is if the  
7 employee had received an award for unpaid overtime hours worked during the  
8 time period for this suit (requiring that the demand for backwages as to Ms. Ong  
9 be offset). However, there was no finding of a violation by the state agency and  
10 its finding creates no precedent for whether there were violations of the Fair  
11 Labor Standards Act as alleged by the Secretary here.

12 Further, the state's investigation is not on trial and inquiry about that  
13 investigation (what information Ms. Ong provided them, what Defendants'  
14 response was, and what else the state investigator considered) would create  
15 confusion and waste the court's and the jury's time. To the extent that there is no  
16 evidence that the witness lied to either agency, the fact of the complaint (to a  
17 different regulatory body under a different set of laws) is irrelevant and should be  
18 excluded. Fed. R. Evid. 403, 608.

19  
20 **7. The Court should prohibit Defendants from presenting evidence and**  
21 **testimony about their civic activities or other evidence of character**  
22 **unrelated to their propensity to be truthful.**

23 Rule 404 of the Federal Rules of Evidence precludes evidence of a  
24 person's character if offered for the purpose of proving that he or she acted in  
25 accordance therewith. Likewise, testimony regarding a person's character is  
26 inadmissible if offered for the purpose of bolstering a witness's credibility. *U.S. v.*  
27 *Hashisaki*, 203 F.3d 833 (Table) at \*2 (9th Cir. 1999), citing *United States v.*

1 *Candoli*, 870 F.2d 496, 506 (9th Cir.1989) (holding that testimony regarding a  
2 prior witness's excellent professional reputation was improper character evidence  
3 because it "amounted to an improper bolstering of [the prior witness's]  
4 credibility"). Rule 608's exception to Rule 404—which allows testimony  
5 regarding the credibility of a witness if the evidence refers only to a person's  
6 character for truthfulness—does not apply here.

7 Here, Defendants are expected to testify about their involvement with  
8 nonprofit organizations and their provision of benefits to their employees that are  
9 are above and beyond what is required of them, including promising "full-time"  
10 work, paying the workers for holidays and providing paid sick leave before they  
11 were required to provide paid sick leave as employers in Seattle, WA. None of  
12 these activities is relevant to either of the Pravitz's credibility or truthfulness.  
13 Rather, such testimony would be a blatant attempt to bolster their credibility and  
14 should not be permitted. Fed. R. Evid. 404. Rather, the issues before the Court  
15 will be whether Defendants employed the Exhibit A Employees; whether the  
16 Exhibit A Employees worked overtime; and whether Defendants failed to pay the  
17 Exhibit A Employees the half-time overtime premiums.

### 18 **CONCLUSION**

19 For the foregoing reasons, the Court should exclude the evidence as  
20 outlined above to most efficiently use the court's time and the honor the service  
21 of the jury called on to hear the evidence.

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1 DATED this December 31, 2018.

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